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In the Supreme Court

of the United States

OCTOBER TERM, 1951

No. 539

ROBERT O. NORMAN,

Petitioner,

vs.

SPOKANE, PORTLAND & SEATTLE RAILWAY CO., a corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Ninth Circuit.

Ellis Watkins,
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Portland 4, Oregon,
Counsel for Petitioner.

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SPOKANE, PORTLAND & SEATTLE RAILWAY CO., a corporation,

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PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
for the Ninth Circuit.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Robert O. Norman, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals, Ninth Circuit, entered in the above case on December 5, 1951 affirming the judgment of the United States District Court for the District of Oregon.

OPINIONS BELOW

Neither the judgment nor the memorandum opinion of the District Court is reported, but will be found in the Appendix. The United States Court of Appeals, Ninth Circuit, affirmed on basis of District Court's opinion. See Appendix.

JURISDICTION

The judgment of the United States Court of Appeals, Ninth Circuit, was entered December 5, 1951. Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended, 28 U.S.C. Sec. 347 (a), 28 U.S.C. 1254(1), Revised Rules Sup. Court of U. S. 38.

STATUE INVOLVED

Federal Employers' Liability Act. See Appendix.

QUESTION PRESENTED

Where a common carrier engaged in interstate commerce by rail contracts with an independent contractor for the repair of the Railroad Company's bridges used in interstate commerce, is it relieved from liability in damages under the Federal Employers' Liability Act for injuries to employees of the independent contractor occurring during the course of such work and caused by the independent contractors' negligent failure to provide a safe place and suitable equipment to the employees for such work?

STATEMENT OF FACTS

On January 10, 1947 petitioner, a carpenter, was engaged with others in repairing a trestle of respondent on its railway lines near Rockton, Oregon. The scaffolding upon which the crew was required to work was held up by hemp rope which gave way and hurled petitioner and two others to the ground, a distance of 60 feet, resulting in extreme and manifold injuries to petitioner and the other two carpenters.

The bridge which was being repaired at the time petitioner was injured was being used by and under the control of respondent who issued to the foreman of the repair crew train orders showing time when its trains would cross upon and over said bridge. The crew of carpenters and petitioner repairing said bridge were employees of Gilpin Construction Co., an independent contractor, and whom the respondent had by contract (See Appendix) engaged to repair its trestles. The petitioner was in name an employee and on the pay roll of the contractor, Gilpin Construction Co.

The respondent had obtained its charter from the State of Washington in which charter there was imposed upon respondent the duty to construct, maintain, renew and repair the tracks and trestles used by it in its franchise for interstate commerce by rail.

There was and is no dispute as to the facts but as to the right under the law to maintain this action the parties agreed to obtain a determination of the single ques-

tion: "May a railroad delegate to an independent contractor the work of repairing, renewing and maintaining its tracks and bridges in the sense that the employees of an independent contractor who are injured in such work are not employees of the Railroad within the scope and meaning of the Federal Employers' Liability Act?"

The District Court and Appellate Court answered the question in the affirmative.

SPECIFICATIONS OF ERROR TO BE URGED

The United States Court of Appeals, Ninth Circuit, erred:

FIRST: In holding that as a matter of law respondent can delegate away its essential functions and charter duties to a private independent contractor and thus escape its obligations under the Federal Employers' Liability Act, and likewise escape the Railroad Retirement Act of 1937, the Carriers Taxing Act, the Railroad Unemployment Insurance Act, the Railway Labor Act, and the Interstate Commerce Act and thereby deprive all railroad employees of the benefits of said respective acts.

SECOND: In failing to hold as a matter of law that petitioner, while engaged in repairing respondent's trestles, was within the protection of the Federal Employers' Liability Act.

THIRD: In affirming the judgment of the United States District Court of the District of Oregon.

REASONS WHY CERTIORARI SHOULD BE GRANTED:

FIRST: The United States Court of Appeals, Ninth Circuit, has erroneously decided an important question of Federal law of direct concern to petitioner and all railway employees and of immediate and drastic consequence beyond the particular facts and parties involved. That is in determining as a matter of law that respondent can by contract with another delegate away its "railroading in the true sense", thusly transferring to an independent contractor such of its charter required duties and thereby escape certain provisions of the Federal Employers' Liability Act, the Railroad Retirement Act, the Railway Labor Act, the Carriers Taxing Act, the Railroad Unemployment Insurance Act and the Interstate Commerce Act, and, by the same token, remove those employees from participating in the financial benefits and protections of the several acts aforesaid, who but for the delegation of work would come under the said acts, the said decision will eventually disrupt and destroy the entire fabric of railway legislation, throw into utter confusion all concerned, and eventually remove all common carriers by rail from all control of the various railway acts aforesaid, (Despatch Shops v. Railroad Retirement Board, 153 F. 644).

SECOND: The decision of the United States Court of Appeals, Ninth Circuit, is in conflict with the decisions of:

A. The Circuit Court of Appeals, 6th Circuit, in Erie Railroad Co. v. Margue, 23 F. 2d 664; Cimorelli v. New York Central Railroad Co., 148 F. 2d 575; Pennsylvania Railroad Co. v. Roth, 163 F. 2d 161 (certiorari denied 332 U.S. 830); Pennsylvania R. Co. v. Barlion, 172 F. 2d 710. (Same legal question.)

B. This Court in Linstead v. C. & O. Ry., 276 U.S. 28; Pedersen v. D. L. & W. Ry. Co., 229 U.S. 146. (Same matter.)

C. Supreme Court of West Virginia in Vickers v. K. & W. V. R. Co., 64 W. Va. 474, 20 L.R.A. (N.S.) 793. (Same problem.)

D. Supreme Court of Virginia in A. C. L. Ry. Co. v. Tredway, 120 Va. 735, 10 A.L.R. 1411 (certiorari denied 245 U.S. 670). (Same question.)

ARGUMENT

Re: Question Whose Resolution of Immediate Importance Beyond Parties and Facts Here Involved.

Hardships to employees and havoc to legislation will flow from this decision unless it is corrected. The Congress has enacted some very wholesome legislation in the interest of the vast army of railway employees, namely, the Railroad Retirement Act, the Carriers Taxing Act, the Railroad Unemployment Insurance Act, Railway Labor Act, Federal Employers' Liability Act

and Interstate Commerce Act. Inter alia, these statutes establish a system of annuity, pension and death benefits for employees of designated classes of employers and a system of unemployment insurance for employees of designated classes of employers. This legislation beneficially affects railway employees in times of sickness, injury, unemployment, old age, etc. This Court is quite familiar with these statutes which from time to time it has considered and construed (Railroad Retirement Board v. Duquesne Warehouse Co., 326 U.S. 446, 90 L. Ed. 192). They constitute a fabric of security to the laborer and his family. In fact, the scope and purposes of said legislation is to the railway employees of this country, what the Emancipation Proclamation of President Lincoln, nearly a century ago, was to the slaves of those turbulent times.

The decision, if permitted to stand, means that the railroads could avoid liability under the Federal Employers' Liability Act by hiring contractors to do most of their work, and there is nothing in the law to prevent them from hiring financially worthless contractors. Such contractors would not come under the Federal Employers' Liability Act as they would not be railroads engaged in interstate commerce. Their employees in turn would have compensation rights only if they carry compensation coverage. Such independent contractors might well be financially worthless. With these possibilities in mind it should not lightly be held that workers, who are doing exactly the same work as is often done by railroad employees, are simply employees of an independent con-

tractor, and therefore beyond the purview of the Federal Employers' Liability Act. That is the exact result of the decision of the lower court in this case. Furthermore, the result would be the removal of the men therein employed from the payroll of the railroads to that of independent contractors, and thusly deplete the funds of the various Acts and throw the employees to the wolves and all the Federal Acts aforesaid to the scrap heap. Conscienceless common carriers would not hesitate very long to take this step which would save them hundreds of millions of dollars in payroll taxes, and license them to return to the good old days.

This thought was expressed in Despatch Shops v. Railway Retirement Board, 153 Fed. 644, in dealing with a question pertaining to railway employees in a case brought under a different Federal Act. We quote:

> "It can be readily seen that the railroad would be free to take from under the act virtually all of their workers whose employment is in the supporting activities, through the simple expedient of setting up wholly owned corporate affiliates to perform these services. It is conceivable that everything from maintenance of way through engineering or book-keeping might be done by so-called 'independent contractors'; the application of this Act and of the other Acts passed for similar purposes and embodying the same language could be severely limited as to render them of little worth in achieving the purpose for which they were passed."

Re: Conflict Between Decision of Circuit Court.

2. The decision in case at bar of the Court below conflicts with, and is contrary to, the decision of the Circuit Court of Appeals, Sixth Circuit, in four cases: Erie Railway Co. v. Margue, 23 F. 2d 664; Cimorelli v. New York Central Railroad Company, 148 F. 2d 575; Pennsylvania Railroad Co. v. Roth, 163 F. 2d 161 (cert. denied 68 Sup. Ct. 208, 332 U.S. 830, 92 L. Ed. 404); Pennsylvania R. Co. v. Barlion, 172 F. 2d 710.

In these four cases the railroads engaged in interstate commerce employed independent contractors to perform their duties and in the course of the performance of the work of the railroads, the respective employees of the independent contractors were injured and the railroads were held liable.

In the Margue case railway contracted with construction company to maintain its tracks, roadway and structures with construction company's own employees. Railroad required construction company to comply with the State Workmen's Compensation Law, the cost to be paid by the Railroad. Margue was injured and sued the Railroad. Defense was that Margue was employee of independent contractor. Court held that the maintenance of Railroad's tracks was essential to the exercise of its franchise rights which work Margue was doing, hence Federal Employers' Liability Act applied and judgment in favor of Margue affirmed.

In the Cimorelli case, the Railroad contracted with the Government to operate in Railroad's yards a temporary place for war material in transit, identity of lading of inbound cars was to be preserved when stored and when forwarded, and Railroad contracted with Construction Company to unload and reload the cars, and railroad superintendent selected place in yards where and fixed the time when cars were to be unloaded or reloaded, and had to approve in advance every item of cost and necessity of purchase of equipment. The Court held that the Construction Company was not an independent contractor and hence the Railroad was liable under the Federal Employers' Liability Act for injuries to Construction Company employee Cimorelli.

In the Roth case, the Railroad agreed with the Government to provide storage yards on its line, and Railroad employed contractor to unload cars, to stencil, mark, and store inbound shipments, to remark and reload outbound shipments, all as required by the Government, and to do other incidental work required by the Railroad, but Railroad directed movement of cars, furnished guards, and retained authority to change unloading or storing of freight following Government complaints. The Court held that the contractor employed by the Railroad was not an independent contractor and that the employee of the contractor was subject to the benefits of the Federal Employers' Liability Act.

In the Barlion case, the Railroad agreed with the Government to provide storage yards on its line and the

Railroad employed a contractor to unload the cars, to stencil, mark, and store inbound shipments, to remark, reload outbound shipments, all as required by the Government, and to do other incidental work required by the Railroad. The Court held that the contractor was not an independent contractor and Barlion, the injured workman, the employee of contractor, was entitled to the benefits of the Federal Employers' Liability Act. The Court held that the "right of the Railroad's control" over contractor rather than "exercise of control" by Railroad, determines whether the contractor is an independent contractor so that injured employee of the contractor is not entitled to benefits of the Act.

The lower Court's failure to apply correctly the principles of the foregoing decisions stemmed from its failure to recognize that the test in the determination of the applicability of the statutory definition is whether effectuation of the declared policy and purposes of the Act comprehend securing to the individual the rights guaranteed and protection afforded by the Act. For example, all lesser courts are guided by this Court and oftentimes the meaning of Congress must be determined, at least clarified, by decisions of the courts, and this Court has laid down a rule by which it can always be determined whose employee a particular workman is (Linstead v. C. & O. Ry., 276 U.S. 28, 48 Sup. Ct. 241, 72 L. Ed. 456).

The heart of the reasoning of the District Court is contained in this sentence: "It would seem that no distinction should be created between construction work

done by this established contractor in building a railroad bridge and in building an office tower." (Opinion Appendix, p. 19.)

The Appellate Court at the oral presentation on appeal made to counsel for appellant the observation that case at bar was settled by the principle laid down in Gaulden v. Sou. Pac. Ry. and Pacific Fruit Express Company, 78 F. Supp. 651. This case involved the right of Gaulden, an employee of Pacific Fruit Express engaged in railroad refrigeration service, to maintain an action under the Federal Employers' Liability Act against both defendants. The District Court said: "It is not for the courts to extend the coverage of the Liability Act into 'new fields'. During the 40-year life of the Federal Employers' Liability Act, Congress while liberalizing its benefits, has not seen fit to extend the scope of the statute beyond 'Railroading in its true sense'." The Appellate Court without opinion affirmed the lower court.

Re: New Fields vs. Railroading In Its True Sense

Shanks v. D. L. & W. R. Co., (1915) 239 U.S. 556, defines what is and what is not interstate transportation as meant by the Statute. Here are the facts:

Shanks sued the railroad for damages resulting from personal injuries suffered through negligence of the railway. What he was doing was altering the location of a fixture in a machine shop. Court said (1915 and long before 1939 Amendment):

> "Coming to apply the test to the case in hand, it is plain that Shanks was not employed in interstate transportation, or *in repairing or keeping in usable condition a roadbed, bridge, engine, car or other instrument then in use in such transportation.* This we think demonstrates that the work Shanks was engaged (like Yurkonis coal miner) was too remote from interstate transportation to be practically a part of it and therefore he was not employed in interstate transportation within the meaning of the employers' Liability Act."

Then the Court said:

> "We have held that the requisite employment in interstate commerce exists where: a workman about to repair a bridge regularly used in interstate transportation is carrying from a tool car to the bridge a sack of bolts needed in his work" (Pedersen v. D. L. & W. R., 229 U.S. 146) and then five other illustrations defining an employee.

In case at bar Norman was actually repairing the bridge, i.e., railroading in its true sense.

Re: Definition of Employee

3. Let us now pass to the relationship petitioner bore to respondent,—whose employee was he? The statute says that "Every common carrier by Railroad while engaging in commerce . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce." So the answer does not depend on who hired, who paid, or who could discharge the servant. The answer is obtained by establishing: Whose is the work, whose is the "power of control," whose is the legal duty to see that the premises whereat,

or the tool with which, the work was done were reasonably safe for the workman, or whose was the non-assignable legal responsibility to discharge the duty in question, or who rendered and who received the services. Direct relationship of employer and employee is not the criterion, the occupation of the workman at the time of the injury may determine the question. In fact, there may be no contractural relation creating employer-employee status.

In Linstead v. C. & O. Ry., supra, the Court said the test is not: Whose employee the injured man is? but whose work was he doing. Linstead was the employee of the Big Four Ry., but killed by the negligence of the C. & O. Ry.

The same result was obtained in A. C. L. v. Tredway ,supra, where man was killed by one railroad whose duty it was to maintain the signal lights which duty it could not assign to another, as that was a non-delegable duty and the one who had that function imposed on it could not evade responsibility by merely letting some other road exercise the franchise duty. Right of the "power of control" was the controlling factor and not the exercise of control. The deceased was on the payroll of the Southern Ry. as its employee, but when killed he was discharging the non-assignable duties of the Atlantic Coast Line Ry.—not on its payroll, not its employee, but doing its work. The A. C. L. was required to respond in damages for his injuries sustained while he was about its business.

The Courts below were not asked to tell if Gilpin Construction Company was an independent contractor—that was admitted. Nevertheless both courts took their own good time to examine the contract between the Railroad and the Contractor and concluded that Gilpin Construction Company was an independent contractor and thereupon held that petitioner was not an employee of the Railroad. In truth the contract between the Railroad and the Contractor was not relevant to the issue of the Railroad's liability to petitioner under the Federal Employers' Liability Act. The work was the work of the Railroad (Linstead v. C. & O. Ry.). The duty was that of the Railroad to keep in repair its track and trestles. It was the duty of the Railroad to see that petitioner had a safe place in which to work—that responsibility it could not shift.

The Railroad's responsibility in this case was fixed by law. Public policy would not sanction any delegation. When petitioner and his associates were hurled sixty feet to their miraculous escape from death, they were engaged in the work of the Railroad. Work that its charter exacted of it and nobody else, and petitioner did not have to be on the payroll as an employee of the Railroad, the sine qua non was not employee-employer relation but "whose was the work being done?" (Linstead v. C. & O. Ry.).

In determining whether an employee is engaged in or connected with "interstate transportation" so that employee can maintain action for personal injuries under the Federal Employers' Liability Act, the test is whether

character of the work is such as to facilitate movement of trains in interstate commerce (Rader v. B. & O. Ry., C.C.A. Ill. 1940, 108 F. 2d 980, Cert. denied 309 U.S. 682, 84 L. Ed. 1026; Pedersen v. D. L. & W. R. Co., 229 U.S. 146).

Re: Charter Duties Non-delegable

4. If this Court answers in the affirmative the single question petitioner sought in his stipulation in the courts below, then petitioner and the others similarly situated will gracefully, though regretfully, fade from the courts of this land, dismiss their several actions at law and take their medicine as good losers.

Is the repair of railroad tracks and trestles an essential, indispensable non-delegable duty of respondent's work as a railroad? Can the Railroad shift that work to another? Can a Railroad duck its responsibility of providing safe places in which the workers do the work of the Railroad? The parties stipulated and the Court found that "It was the duty of defendant to maintain its railway lines and its roadbed, tracks and bridges, in a reasonably safe condition for its use in interstate commerce" (Findings of Fact II). Tracks and bridges are as indispensable to interstate commerce by Railroad as are engines and cars; and sound economic reasons unite with settled rules of law in demanding that all of these instrumentalities be kept in repair. The statute charges the carrier with this duty. The work of keeping such instrumentalities in a proper state of repair while thus used is so closely related to such commerce as to be in

practice and in legal contemplation a part of it (Pedersen v. D. L. & W. R. Co., 229 U.S. 146). It is the settled law in cases like case at bar that the Railroad has the non-delegable duty to furnish workman a safe place in which to work and safe equipment with which to work (Thomas, et al. v. West Jersey Railroad Co., 101 U.S. 71; Miller v. Sou. Pac.[1], 20 Ore. 285; Fisher v. P. R. L. & P. Co., 74 Ore. 229; Vickers v. K. & W. V. Railroad Co., 64 W. Va. 474; 20 L.R.A. (N.S.) 793; Panama Railroad Co. v. Minnix, C.C.A. Canal Zone, 282 F. 47; Blessing v. Camas Prairie R. Co., 3 Wash. 2d 266, 100 Pac. 2d 416; A. C. L. Ry. v. Tredway, 120 Va. 735, 10 A.L.R. 1411 (cert. denied 245 U.S. 670); Knahtla v. O. S. L., 21 Ore. 136; C. O. & W. Ry. v. Wilker, 16 Okla. 384, 3 L.R.A. (N.S.) 595).

Philadelphia, B. & W. R. Co. v. Karr, 38 App. D.C. 193, was an action by Karr against railroad to recover damages for injury to real estate. Railroad was authorized by Congress to construct a tunnel. Railroad contracted with construction company to do the work, which was negligently done, resulting in damage to adjacent property. Railroad contended that contractor and not railroad was liable. The court held railroad responsible and upheld the verdict for plaintiff. Court, inter alia, said:

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[1]"In this case (Miller v. Sou. Pac.), the authorities are carefully reviewed, the reasoning is conclusive and the most satisfactory and exhaustive consideration of this subject we have found in the books is presented," said U.S. Circuit Court Justice Sanborn in St. Louis, Iron Mountain & Southern Ry. v. Needham, 63 F. 107 at 111.

> "The liability of the principal is in each case dependent - - - upon whether the circumstances of the case are such as to prohibit the principal from contracting away his liability. In this instance - - - . The grant to defendant was a personal one. . . . The franchise carried with it the liability, and defendant, in accepting the privilege, accepted the liability which could no more be contracted away than could the franchise itself."

The Court also said that the rule to be gathered from the American cases as summarized by Thompson in his work on Negligence, 2d Ed., Sec. 672, was as follows:

> "It is that, whenever the independent contractor, in order to prosecute his work under his contract, must exercise, in whole or in part, a franchise granted by the legislature to his employer,—the railroad company,—the company must answer for his torts, because it is bound to see to the correct execution of the powers conferred upon it by the legislature."

CONCLUSION

It is submitted that the decision below is incorrect and should be corrected and that this Petition for a Writ of Certiorari should therefore be granted.

Respectfully submitted,

ELTON WATKINS,
Counsel for Petitioner,
Robert O. Norman.

APPENDIX 1

OPINION

JAMES ALGER FEE, District Judge:

Norman, according to the agreed facts, was an employee of Gilpin Construction Company, an established private corporation engaged in contracting and construction work of a general nature, including from time to time bridge and trestle repairs for railroads, among which was the defendant Spokane-Portland & Seattle Railway Co., a common carrier of persons and of property in interstate commerce. Gilpin had not rejected the Oregon Workmen's Compensation Act, and regularly made contributions to the State Industrial Accident Commission on behalf of all its employees. The Rockton Bridge of the railroad fell into disrepair. A contract was entered into between Gilpin and the railroad for the repair thereof. During the work, Norman was seriously injured by a fall from a scaffold, which he alleges was improperly protected. For this injury, he brought action under the Federal Employers' Liability Act, upon the theory that the railroad is under a non-delegable duty to perform such work by its own employees and is therefore liable to any workman injured thereon. It was originally asked by plaintiff that the cause be tried by jury. However, the issues were finally submitted, both as to fact and law, to the Court.

There was an amended pretrial order drawn after conference, which practically reduced the case to the

solution of the following question of law: "Where a railroad corporation engaged in interstate commerce contracts with an independent contractor for the construction, repair and maintenance of the railroad company's bridges and trestles used in interstate commerce, is it relieved from liability in damages under the Federal Employers' Liability Act for injuries to employees of the independent contractor occurring during the course of such work and caused by the independent contractor's negligent failure to provide a safe place and suitable equipment to the employees for such work?"

The cause was submitted upon the transcript of evidence taken in a similar case in the state court and the agreements contained in stipulations and in the pre-trial order. It is agreed that Gilpin was in fact a truly independent contractor acting under a bona fide contract with the railroad, which was not designed or intended as a scheme or artifice to evade the provisions of the Federal Employers' Liability Act. It is stipulated that the 1939 amendment of the Federal Employers' Liability Act has "no bearing on who are 'employees' of a railroad" under the Act. The parties have likewise agreed that the following decisions do not bear on the basic issue and may be disregarded:

"1. Decisions as to whether the work being performed by a particular railroad employee at the time of injury was within interstate commerce so as to vest jurisdiction of the action in federal courts.

"2. Decisions holding that particular factual situations by common law tests constituted the parties em-

ployer-employee rather than independent contractor-contractee.

"3. Decisions under the Railroad Retirement Act, Fair Labor Standards Act and Social Act where the question presented is whether an employee is engaged in interstate commerce within the scope of the particular legislation and/or whether the employee falls within the coverage of said legislation or is otherwise within the scope of such legislation, including that of the relationship of employer-employee."

The Court therefore finds that the facts as agreed in the amended pretrial order. Particularly, the Court finds as a fact that Norman was an employee of Gilpin and not an employee of defendant. The Court also finds that Norman was acting under the direction and control of Gilpin and not of defendant. Gilpin had unrestrained power to direct the manner and method of doing the work and the choice of its own employees. There was actually no attempt to delegate any responsibility by defendant, but simply a normal transaction of letting repair work to an independent contractor.

The Court is of opinion that a railroad company may employ a contractor to repair bridges. The duty of the railroad company to keep such transportation facilities in reasonable repair is not nondelegable so far as employees of the independent contractor are concerned. Here the independent contractor has been in business for many years and was covered under the Workmen's Compensation Act.

have and it is hereby granted judgment against plaintiff for defendant's costs and disbursements herein, taxed at $157.50.

Done and dated in open court this 9th day of March, 1951.

/s/ JAMES ALGER FEE,
Chief Judge.

APPENDIX 3

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ROBERT O. NORMAN, *Appellant,*	)	
vs.	)	
SPOKANE-PORTLAND & SEATTLE RAILWAY CO., a Corporation, *Appellee.*	)	No. 12,882 Dec. 5, 1951

Appeal from the United States District Court for the District of Oregon

BEFORE: HEALY and POPE, Circuit Judges
LEMMON, District Judge

PER CURIAM

This is a suit against a railroad company under the Federal Employers' Liability Act by an employee of a bona fide independent contractor. The appeal is from a judgment dismissing the employee's suit. The judgment

is affirmed for the reason given in the district court's opinion, ...F. Supp. .

(Endorsed:) Per Curiam Opinion. Filed Dec. 5, 1951. Paul P. O'Brien, Clerk.

APPENDIX 4

Federal Employers' Liability Act (45 U.S.C. 51)
Section 1.

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

APPENDIX 5

Following is a copy of the contract between the Railroad and the Independent Contractor under which the work was done. Received in evidence and marked Defendant's Exhibit No. 7:

"

DOCUMENT NO. SP&S 7208

THE GILPIN CONSTRUCTION COMPANY
GENERAL CONTRACTORS
4850 N. W. Front Avenue
Box 3860
Portland, Oregon

October 7, 1944.

Spokane, Portland and Seattle Railway Co.,
901 NW Hoyt Street,
Portland 9, Oregon
Attention: Mr. A. J. Witchell, Chief Engineer

Gentlemen:

As per our conversation of October 6th, we submit a proposal for furnishing labor and necessary equipment to do repair and maintenance work on your trestles and bridges, as outlined in our talk, on a basis of cost plus ten (10%) percent.

Our costs are to include all expenses to us made up as follows:

All payrolls in connection with this work, all insurance on men, getting equipment and tools to and from the jobs and rentals on any equipment which is rented from others by us. On any equipment which is owned

by us, the ten percent will not be added and all our rental prices are to comply with the OPA rental rates.

All saws, peavies and other miscellaneous small tools will be billed out to you at the start of the work and a credit will be issued at the finish of the job on the value of the tools according to their condition when returned.

We propose to have one timekeeper to take care of all the crews and his time will be distributed to the different jobs.

Our crews will be controlled by a foreman who will be directly in charge of the work. This foreman will receive $2.00 more per day than the pilemen, whose scale is $1.49 per hour.

On work where our boys have to live away from home, we will have to work them ten hours per day in order to get them to leave home and this extra time helps pay their board. It is also understood that our men will work on Saturdays at time and one-half pay.

Yours truly,

THE GILPIN CONSTRUCTION COMPANY
/s/ Otto Herman
Otto Herman, Vice President

SPOKANE, PORTLAND AND SEATTLE RAILWAY CO.

ACCEPTED: By /s/ A. J. Witchell
Chief Engineer

APPROVED: By /s/ T. F. Dixon
Vice Pres. & General Manager

FEB 7 1952
CHARLES ELMORE CROPLEY

In the Supreme Court

of the United States

OCTOBER TERM, 1951

No. 539

ROBERT O. NORMAN,

Petitioner,

vs.

SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY, a corporation,

Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 1-52

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In the Supreme Court

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OCTOBER TERM, 1951

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ROBERT O. NORMAN,

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OPINIONS BELOW

The trial court's opinion is reported at 101 F. Supp. 350. The *per curiam* opinion of the United States Court of Appeals for the Ninth Circuit has not yet been reported but is printed in the transcript of record (R. 26).

QUESTION PRESENTED

May an employee of a *bona fide* independent contractor maintain suit against a railroad under the Federal Employers' Liability Act to recover damages on account of personal injuries caused by the contractor's negligent failure to provide its employee with a safe place to work?

STATUTE INVOLVED

Section 1 of the Federal Employers' Liability Act, as amended (45 U.S.C.A., Sec. 51), states:

> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

STATEMENT OF THE CASE

This action was commenced in the United States District Court for the District of Oregon by a resident of the State of Washington against a Washington corporation (R. 11). Petitioner, an employee of Gilpin Construction Company, brought suit against respondent under the Federal Employers' Liability Act to recover damages for personal injuries sustained by him when he fell a distance of between 60 and 70 feet to the ground from an Oregon railroad trestle known as "Rockton Bridge," owned and used by respondent.

The findings of fact (R. 11-15) were not challenged by petitioner in the Court of Appeals. They conclusively establish that on January 10, 1947, the date of the accident which gave rise to this action, and for a long time prior thereto, petitioner was employed by and working for Gilpin Construction Company (hereinafter referred to as Gilpin) as a member of one of its construction crews which was engaged on that day in the work of repairing and enlarging Rockton Bridge. At the time of the accident, and for a long time prior thereto, peti-

tioner was and had been acting under the direction and control of Gilpin, and not of the respondent (R. 13).

On or about October 27, 1944, respondent entered into a contract with Gilpin whereby for a sufficient consideration the latter undertook and agreed to do repair and maintenance work on respondent's trestles and bridges, including Rockton Bridge, and to furnish the equipment, tools and labor to do that work (R. 12). Gilpin, an Oregon corporation, had been engaged for many years in a general contracting business, including the construction, maintenance and repair of railroad trestles and bridges. It was a wholly independent corporation (R. 12).

The relationship established by the contract and the performance of the contracting parties thereunder at the time of the accident was that of true independent contractor and contractee (R. 13). Gilpin had unrestrained power to and did direct the manner and method of doing the work of repairing and maintaining the Rockton Bridge, and to choose its employees. Respondent made no attempt to delegate any of its responsibility to Gilpin, but by its contract with Gilpin simply entered into a normal transaction of letting necessary repair work to an independent contractor (R. 14). Gilpin was in fact a true independent contractor acting under a *bona fide* contract which was not designed or intended as, and in fact was not, a scheme or an artifice to evade the provisions of the Federal Employers' Liability Act (R. 13).

Upon these particular facts, the District Court, after reviewing hundreds of cases, concluded that no

decision " * * * suggests that an employee of a true independent contractor erecting or repairing a bridge on a right of way becomes an employee of the railroad company because the duty of construction and repair of such bridges cannot be delegated. No case suggests that the employee of an independent contractor becomes an employee *pro hac vice* under the circumstances. * * * " The court further stated:

> "If there were a question of control of the operation by the railroad, a possibility exists that liability of the railroad might be worked out. * * * " (R. 6-7).

However, in the absence of any such question of the railroad's control over the operation, Judge Fee held that petitioner had no basis for an action against respondent under the provisions of the Federal Employers' Liability Act.

The Court of Appeals for the Ninth Circuit, in a *per curiam* opinion, affirmed the judgment of the District Court "for the reason given in the District Court's opinion" (R. 26).

ARGUMENT

I. The Decision Below Is Clearly Correct.

A plaintiff who invokes the beneficial provisions of the Federal Employers' Liability Act must establish that at the time of the occurrence of the injury: (1) the defendant was a common carrier by railroad in interstate or foreign commerce, and (2) that he suffered in-

jury while employed by the carrier in such commerce. It is fundamental that " * * * Congress used the words 'employee' and 'employed' in the statute in their natural sense, and intended to describe the conventional relation of employer and employee." (*Robinson v. Baltimore and Ohio Railroad Co.*, 237 U.S. 84, 35 S. Ct. 491, 59 L. Ed. 849; *Hull v. Philadelphia & R. Ry. Co.*, 252 U.S. 475, 40 S. Ct. 358, 64 L. Ed. 670; and see *Cosmopolitan Shipping Co. v. McAllister*, 337 U.S. 783, 69 S. Ct. 1317, 93 L. Ed. 1692.)

In this case, the unchallenged findings demonstrate that at the time of the occurrence of his injury, petitioner was employed by and working for Gilpin as a member of one of its construction crews, that he was acting under Gilpin's exclusive direction and control, and that Gilpin had the unrestrained power to and did direct the manner and method of doing the work, and also had the power to choose its employees (R. 13-14). Consequently, petitioner, not being an employee of respondent, cannot maintain this action under the Federal Employers' Liability Act.

The stipulation between the parties and the findings further establish that Gilpin was in fact a true independent contractor acting under a *bona fide* contract which was not designed or intended as, and in fact was not, a scheme or artifice to evade the provisions of the Federal Employers' Liability Act (R. 10, 13). Accordingly, petitioner cannot contend that the contract, which was not included in the record before the Court of Appeals, is void, as in violation of Section 5 of the Act (45 U.S.C.A., Sec. 55).

The law of this case was settled by the Court adversely to petitioner's contentions in the case of *Chicago, R. I. & P. R. Co. v. Bond,* 240 U.S. 449, 36 S. Ct. 403, 60 L. Ed. 735. There, the railroad entered into a contract with the plaintiff's intestate for the shoveling of coal on a per-ton basis. He was to remove all coal from cars into coal chutes in such amount and at such times as required by the company. He was also to break the coal into appropriate sizes, gather up coal that fell from the chute pockets to the ground, and place the same on cars or engines as desired by the company. The railroad was to furnish the necessary tools for the job and to keep a record of all coal delivered. Payments were based on the amount of coal handled as determined by daily reports of cars unloaded by the decedent. He was required to submit a report and furnish a certification from each engine man, hostler or other employee showing the number of tons of coal delivered to any engine. The Court reversed a judgment in favor of the plaintiff in an action brought under the Federal Employers' Liability Act on the ground that under the contract the railroad had not retained the right to direct the manner in which the work was to be done or to control the results to be accomplished. Therefore, decedent was an independent contractor, not entitled to the benefits of the Federal Employers' Liability Act. The Court also rejected the contention that the contract was a violation of Section 5 of the Federal Employers' Liability Act, and held that the decedent was not incompetent to assume the relationship of an independent contractor to the railroad.

Two other decisions of this Court, *Robinson v. Baltimore and Ohio Railroad Co.*, 237 U.S. 84, 35 S. Ct. 491, 59 L. Ed. 849, and *Wells Fargo & Co. v. Taylor*, 254 U.S. 175, 41 S. Ct. 93, 65 L. Ed. 205, reach a similar result. They hold that where a railroad contracts with another company for the furnishing of facilities, or services, or the performance of work necessary to the fulfillment of its own obligations to the public, the contractor's employees may not claim the benefits of the Federal Employers' Liability Act.

The Courts of Appeal for the Third, Fourth, Sixth, Seventh and Ninth Circuits have applied the established rule of these cases in *Docheney v. Pennsylvania R. Co.*, 60 F. (2d) 808 (C.A. 3), cert. den. 287 U.S. 665, 53 S. Ct. 222, 77 L. Ed. 573; *Norfolk & W. R. Co. v. Hall*, 57 F. (2d) 1004 (C.A. 4); *Jones v. New York Central R. Co.*, 182 F. (2d) 326 (C.A. 6), cert. den. 340 U.S. 850, 71 S. Ct. 78, 95 L. Ed. 38; *Miles v. Pennsylvania R. Co.*, 182 F. (2d) 411 (C.A. 7); and *Gaulden v. Southern Pacific Co.*, 78 F. Supp. 651 (D.C. Cal.), aff'd 174 F. (2d) 1022 (C.A. 9).

II. There Is No Conflict of Decision.

Petitioner maintains that the decision in this case conflicts with the opinions of the Court of Appeals for the Sixth Circuit in *Cimorelli v. New York Central R. Co.*, 148 F. (2d) 575, and the two subsequent cases following it, *Roth v. Pennsylvania R. Co.*, 163 F. (2d) 161, cert. den. 332 U.S. 830, 68 S. Ct. 208, 92 L. Ed. 404, and *Pennsylvania R. Co. v. Barlion*, 172 F. (2d) 710.

In each of these cases the court found that the work committed to the contractor involved many interdependent details of railroad operating procedure, and that the control of no one of these details could be surrendered without disorganization of the whole. Thus, the contractor and its employees were necessarily subject to the railroad's control in the method and manner of doing their work. From these facts, the courts concluded that the contractor's employees, while engaged in the work, were *pro hac vice* employees of the railroad under the doctrine of *Singer Mfg. Co. v. Rahn,* 132 U.S. 518, 10 S. Ct. 175, 33 L. Ed. 440, and *The Standard Oil Company v. Anderson,* 212 U.S. 215, 29 S. Ct. 252, 53 L. Ed. 480. The case of *Linstead v. C. & O. Ry. Co.,* 276 U.S. 28, 48 S. Ct. 241, 72 L. Ed. 453, rests on the same legal principles.

These decisions have no application here in view of the factual findings that petitioner was acting under Gilpin's exclusive direction and control and that Gilpin had unrestrained power to and did direct the manner and method of the work (R. 13-14).

Petitioner also cites *Atlantic Coast Line R. Co. v. Treadway's Adm'x,* 120 Va. 735, 93 S.E. 560 (S. Ct. App. Va.), cert. den. 245 U.S. 760, 38 S. Ct. 191, 62 L. Ed. 540, as a conflicting case. There it was held that the duties of operating signals and keeping a special signal light which served the operation of the defendant's trains exclusively were nonassignable, in the sense that a switch tender paid by another carrier with whom defendant had a contract for the maintenance of a railroad cross-over was an employee *pro hac vice* while

engaged in performing these duties for the defendant. Therefore, the right to sue under the Federal Employers' Liability Act was sustained. In the *Treadway's Adm'x* case, the Virginia Court distinguished its decision in *Bibb's Adm'r v. Railroad,* 87 Va. 711, 14 S.E. 163, where it had been held that the responsibility of reconstructing a railroad bridge there delegated to the independent contractor was assignable, in so far as the railroad's liability to employees of the negligent contractor was concerned.

Appellant's reliance on *Erie Railroad Co. v. Margue,* 23 F. (2d) 664 (C.A. 6), is clearly misplaced. In that case, the court held that the defendant railroad's contract with a construction company for the maintenance of its right of way was void under section 5 of the Federal Employers' Liability Act. The fact that the contract provided that the construction company was to comply with the state compensation laws, and that the construction company was largely organized and controlled by former employees of the defendant, were some of the special circumstances leading the court to find that the contract was entered into for the purpose and with the intent of evading liability under the Act. The recent decision of the same court in *Jones v. New York Central R. Co.,* supra, indicates that only when special circumstances of that kind are present is a court justified in disregarding the separate legal entity of the contractor. The findings of fact disclose the absence of such circumstances in the case at bar. Here the district court found that the contract between respondent and Gilpin "was

not designed or intended as, and in fact was not, a scheme or artifice to evade the provisions of the Federal Employers' Liability Act" (R. 13).

Finally, it is sufficient to point out that the case of *Vickers v. Kanawha & West Virginia R. Co.*, 64 W. Va. 474, 63 S.E. 367 (S. Ct. W. Va), which is claimed to conflict with the decision below, did not arise under the Federal Employers' Liability Act.

CONCLUSION

Petitioner argues that if the decision below is allowed to stand, railroads can avoid liability to their own employees under the Federal Employers' Liability Act by hiring financially worthless contractors to take over railroad operations, and then by transferring employees from the payroll of the railroads to that of the independent contractors.

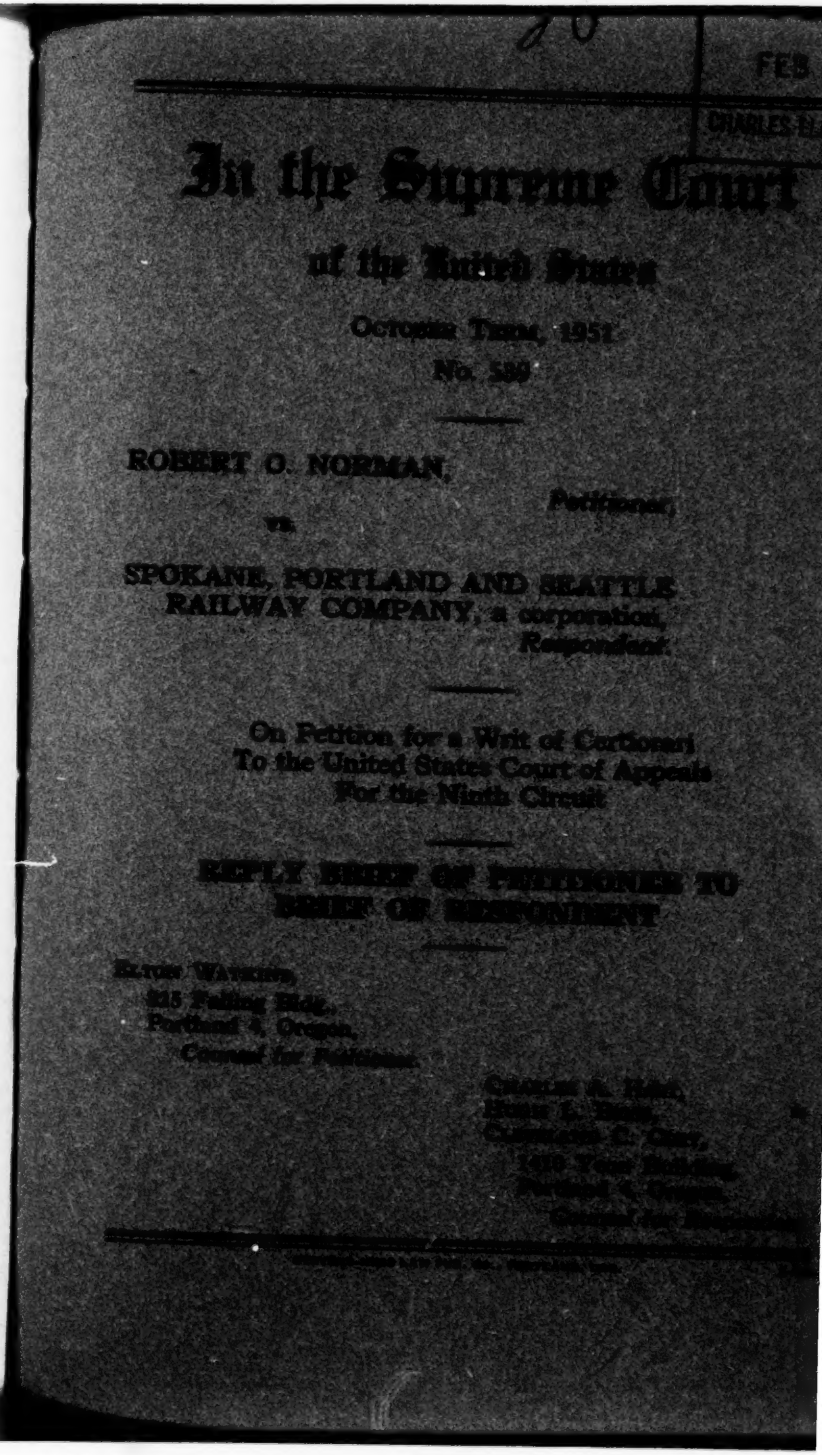
If there were no other protection, Section 5 of the Federal Employers' Liability Act (45 U.S.C.A. § 55) would be an effective bar to any such scheme. It is therein provided that any contract, the purpose or intent of which is to enable any common carrier to exempt itself from any liability created by the Act, shall to that extent be void. However, in the case at bar, petitioner stipulated that the agreement betwen Gilpin and respondent was " . . . a *bona fide* contract not designed or intended as a scheme or artifice to evade the provisions of the Federal Employers' Liability Act." (R. 10).

Apart from the benefits of the Workmen's Compensation Act of the State of Oregon, which petitioner applied for and received following his accident (R. 14), he has been free to maintain an action for damages against respondent under principles of common law liability. However, in the absence of diversity of citizenship, he may not invoke federal jurisdiction solely under the Federal Employers' Liability Act.

In view of the trial court's findings of fact and the stipulations between the parties, the decision of the lower courts in this unique case is clearly correct. No substantial question of federal statutory interpretation remains open on the record presented by petitioner. The petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit should be denied.

Respectfully submitted,

CHARLES A. HART,
HUGH L. BIGGS,
CLEVELAND C. CORY,
Counsel for Respondent.


In the Supreme Court
of the United States
OCTOBER TERM, 1951
No. 589
ROBERT O. NORMAN,
Petitioner,
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SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY, a corporation,
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On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit
REPLY BRIEF OF PETITIONER TO BRIEF OF RESPONDENT

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REPLY BRIEF OF PETITIONER TO BRIEF OF RESPONDENT

ARGUMENT

The soundness of any judicial utterance lies in its reasoning. Here is the core of the reasoning of the decision of court below in case at bar: "In view of the modern policy of administrative compensation for accidents, it would seem that no distinction should be cre-

ated between construction work done by this established contractor in building a railroad bridge and in building an office tower. Just because his employer happened by chance to be building a railroad bridge instead of an office building is no reason for permitting plaintiff to gamble upon the windfall of a heavy verdict or the disaster of no recovery simply because he was incidentally working on railroad bridge construction. Nor, on the other hand, is it sound public policy, if he lost in such gamble, to permit him to fall back into the safety net of the Workmen's Compensation Act." (R. 7-8). The reasoning of Mr. Justice Douglas in *Bailey v. Central Vermont R. Co.*, 319 U.S. 350, 87 L. Ed. 1444, to the contrary notwithstanding.

The Appellate Court of Illinois, in *Downs v. B. & O. R. Co.*, 102 N.E. 2d 537, Jan. 16, 1952, lays down the last word on the question submitted to this Court by Petitioner Norman. There Downs sued the Railroad for injuries sustained in the course of his employment by an independent contractor unloading ore from a boat for transfer to Railroad's cars at a lake port. Court held that the dock company was a MERE AGENCY of the Railroad—not an independent contractor—so that plaintiff was Railroad's employee and that plaintiff was engaged in interstate commerce at the time and place of the accident.

In the *Downs* case the plaintiff and defendant respectively took the exact positions taken by Norman and the Railroad in case at bar. The Court after stating concisely and clearly the facts and the law, thereupon proceeded to analyze the many decisions of this Court

and others including most of the cases cited by petitioner and respondent in case at bar.

With respect to the position taken by the Railroad in the *Downs* case, similar if not the same as that of respondent in case at bar, the Court pointed out the vice of the Railroad's position and distinguished upon the facts in the cases the Railroad cited.

By this reference the petitioner herein adopts as his Reply Brief to Respondent's Brief, the decision in the case of *Downs v. Baltimore & Ohio R. Co.*

Let us now analyze the case respondent asserts as the law of this case—*C. R. I. & P. R. Co. v. Bond,* 240 U.S. 449, 60 L. Ed. 735, and where the Court said:

> "Thus, being of opinion that Turner was not an employee of the company, but an independent contractor, it is not material to consider whether the services in which he was engaged were in interstate commerce."

This case arose in 1915 and very likely if considered now or at any time since the 1939 Amendment would be against respondent. In the *Bond* case the Railroad was in the position where it could in fact turn over the work in question to Turner and allow him to carry on the work as an independent contractor. In the work Turner could have carried on his job 24 hours of the day without any interference with operation of the trains and the commerce of the Rock Island Railroad. That is to say, the freedom of action of the Rock Island was in no way curtailed and the statute as interpreted at that time has no application to the situation as of the present time

or at any time since the 1939 Amendment. But eliminating the 1939 Amendment entirely, the *Bond* case as it is called, is no criterion for the case at bar. In case at bar, Railroad could not grant to the construction company the freedom of action that the Rock Island granted to decedent. Respondent was, by its franchise with the state in carrying on its interstate commerce, bound to keep itself in the position where it could control the bridge and could use it in its daily interstate commerce, which in fact it did use, and Gilpin Construction Company subordinated its work to the operation of the trains of respondent and observed the train orders of respondent issued from day to day in the operation of its trains over the trestle in question. Respondent was in duty bound by its franchise to maintain and keep in repair its instrumentalities used by it in its interstate commerce. This was an essential function which it could not delegate to anybody. Neither the Rock Island nor respondent in 1915 or in 1947 could have delegated to an independent contractor the repair of the tracks and trestles used by them in interstate commerce.

It is rather interesting in reviewing the *Bond* case to refer to *Kamboris v. O. W. R. & N.*, 75 Ore. 358, decided in 1915 by the Supreme Court of Oregon, dealing with the same subject as by the Supreme Court of Oklahoma in the *Bond* case. Be it said to the credit of the Oregon Court that it laid down the law in 1915 which has been the law everywhere since the 1939 Amendment.

The *Bond* case and *Casement v. Brown,* 148 U.S. 615, and like authorities, are disposed of by *Atlantic*

Coast Line v. Tredway (120 Va. 735, 10 A.L.R. 1411, certiorari denied 248 U.S. 670), in the following language:

> "They are inapplicable to the instant case, for the reason that the duties of the servant in question were of such a character, as above noted, that they could not be assigned by the defendant to an independent contractor so as to release itself from the position of responsibility for their proper discharge. That is to say, the defendant could not abdicate its position of master with regard to the plaintiff's intestate in the instant case, by delegating or assigning its duty of control of such servant to any independent contractor. It is not a case in which the doctrine of independent contractor is applicable. See authorities collated in note to 66 L.R.A. pp. 119, 136, 137, 140, 142; Boucher v. New York, N. H. & H. R. Co., supra, 13 L.R.A. (N.S.) 1177, and authorities collated in note thereto."

Respondent cites *Bibb's, Adm'r. v. Railroad,* 87 Va. 711, as authority for the right of a common carrier to delegate the duty of the repair of its trestles used by the common carrier in interstate commerce. That case was decided in 1891, and in truth the facts are similar to case at bar in that contractor Smith was building a bridge for the Railroad. Bibb was an employee of Smith. A heavy train approached the trestle and contractor Smith signaled it to proceed. It did, bridge broke, and Bibb was killed. The Court held that the work was not inherently dangerous and neither it nor the results of its building were nuisances in themselves. So Bibb's, Adm'r. could not recover against the Railroad. Perhaps it is decisions of this kind that brought about the enactment of the Federal Employers' Liability Act.

In *Thomas, et al. v. West Jersey R. Co.*, 101 U.S. 71, 25 L. Ed. 750, Court said:

> "Where a corporation like a railroad company, has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions which undertakes, without the consent of the state, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the state, and is void as against public policy."

Respondent cites cases like *Wells Fargo v. Taylor* (an express messenger), *Robinson* (a Pullman porter) *v. B. & O., Gaulden* (a refrigeration mechanic) *v. S. P. Co.* Cases that have no place in dealing with questions under the Federal Employers' Liability Act because Taylor, Robinson, Gaulden and their kind were not employed by or doing the work of a "common carrier by Railroad",—the only kind of common carrier covered by the Federal Employers' Liability Act. The dividing line is: Railroading in its true sense vs. New fields, i.e., furnishing of facilities or services. The repair of a railroad trestle and the tracks thereon is railroading in its true sense and such persons doing said work are engaged in interstate commerce.

It is therefore urged that the Writ prayed for be allowed.

Respectfully submitted,

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